

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DONALD E. IRVIN</b>	)	
Claimant	)	
VS.	)	
	)	
<b>BOEING COMPANY</b>	)	
Respondent	)	Docket No. 1,008,500
	)	
AND	)	
	)	
<b>AMERICAN MANUFACTURERS</b>	)	
<b>MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from the May 13, 2003, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**Issues**

Judge Barnes found claimant failed to prove that he injured his back when he tripped at work on June 1, 2002. In addition, Judge Barnes found claimant failed to give timely notice. Accordingly, preliminary benefits were denied. Claimant disputes those findings and seeks Appeals Board (Board) review of whether claimant suffered personal injury by accident arising out of and in the course of his employment and whether timely notice was given. These issues are considered jurisdictional and are subject to review by the Board on an appeal from a preliminary hearing Order.<sup>1</sup>

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<sup>1</sup> K.S.A. 44-534(a)(2); K.S.A. 44-551(b)(1).

**Findings of Fact and Conclusions of Law**

Claimant has been employed by respondent for twenty-five years. He contends that he injured his back on June 1, 2002, when he tripped while walking on an uneven surface. Claimant reported this incident to a safety monitor, Steven Reynolds. According to claimant's testimony, he told Mr. Reynolds that ". . . I fell in this hole and we need to get it fixed before anybody else gets hurt."<sup>2</sup> Claimant further contends that he told Mr. Reynolds that his hip and ankle hurt but he didn't think it was bad enough to go to respondent's Central Medical center.

Claimant testified that that same day he also spoke with his supervisor, Jeff Jones, and told him about the accident. Claimant did not request medical treatment, telling Mr. Jones that he was just "a little bit shaken up" and that he may have popped his hip out.<sup>3</sup> A few days thereafter claimant said he informed Mr. Jones that he was still having problems and that his doctor was sending him to therapy. Claimant said he did not file an accident report nor request medical treatment from respondent because he thought workers compensation was only for serious injuries.

Q. (Mr. Riedmiller) Why were the medical bills submitted to Boeing health insurance and not Boeing Workers' Compensation?

A. (Mr. Irvin) Because when I first started, they put me out on family leave, and I had never filed a claim against Workmen's Comp., I didn't even really know what it was, until Diane Hansen told me, she says, Don, if this happened out here, how come you are not going through Workman's Comp.<sup>4</sup>

Q. What was your response to that?

A. I said I didn't know nothing about it, I've never filed anything, I thought Workmen's Comp. was when you lost a limb or a leg or an eye or something like that. I've never filed a claim against Workmen's Comp. Every

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<sup>2</sup> P.H. Trans. at 15.

<sup>3</sup> P.H. Trans. at 16.

<sup>4</sup> P.H. Trans. at 25-26.

Workmen's Comp. deal I've ever heard about out at Boeing and stuff was like the guy that lost his arm.<sup>5</sup>

Respondent does not dispute that claimant tripped on an uneven surface at Boeing on June 1, 2002, respondent admits claimant reported that incident to the safety monitor. As a result, a safety report was generated and the uneven surface was repaired. Respondent does dispute, however, that claimant timely reported that he had suffered an injury as a result of tripping on the uneven surface. Furthermore, respondent denies claimant suffered an injury. To the contrary, respondent contends claimant's back condition and surgery were unrelated to his work with respondent.

Claimant did not request medical treatment from respondent. Instead, he went on his own to his personal physician, Scott M. Hane, M.D. He was eventually referred to orthopedic surgeons Bruce R. Buhr, M.D., and Earl C. Mills, M.D., who performed the September 9, 2002 surgery. All of claimant's medical treatment expenses were paid by his health insurance carrier.

A review of the medical treatment records fails to reveal any mention of claimant's back condition being related to an accident at work. Claimant requested and received leave from respondent under the Family Medical Leave Act (FMLA) throughout the course of his back treatment. The medical records relied upon for FMLA leave do not reference a work-related injury. Furthermore, Dr. Hane's and Dr. Mills' records describe the onset of claimant's back problems as January 2002 and not June 1, 2002. Claimant first requested workers compensation benefits for his alleged June 1, 2002 injury on December 12, 2002.

On November 13, 2001, claimant presented to Dr. Hanes with back pain that radiated down into the leg (the records do not indicate which leg). Claimant attributed the onset of the low back pain to helping family members move. He mentioned a prior back injury about ten years ago, but denied any particular injury precipitating his symptoms this time. And from February 8, 2002 to May 29, 2002, claimant presented several more times to Dr. Hanes with complaints of continued left buttock pain and with pain in the back of his left leg. But when claimant was examined by Dr. Pedro Murati on March 6, 2003, he denied having back problems or injuring his back before the June 1, 2002 incident at work.

When Dr. Hanes examined claimant on June 26, 2002, he complained of a worsening of pain in his left buttock and leg. The pains were becoming located higher up

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<sup>5</sup> P.H. Trans. at 26

the spine, in addition to the lumbar/sacral region, with radiculopathy down below the knee and into the calf accompanied with cramping in his right calf. The June 25, 2002, MRI revealed significant degenerative disc disease and the overall assessment was low back pain secondary to spinal stenosis with disk protrusion.

The Wichita Clinic notes of July 26, 2002, reflect claimant presented in follow-up on his bulging disk with leg pain. He also stated that, because of his job at Boeing, he would prefer to postpone his surgery until September as their contract comes up September 2002, and he was concerned that they might go on strike. If so, he would not have had any medical benefits while he was off, and would have incurred all of the costs that were associated with surgery. He did not feel as though the pain had gotten any worse. It was simply no better. It was primarily in the buttock and upper leg (the records do not indicate which leg). There was no weakness into the lower leg or numbness or tingling. Overall, he reported doing fairly well.

Boeing's Central Medical notes of January 30, 2003 reflect that on August 30, 2002, claimant obtained medical certification for intermittent leave documents that stated: "Left low back, hip, and leg pain ongoing since January 21, 2002, despite medical tx and PT dated 7-22-02." <sup>6</sup> Claimant told Central Medical that he had been having lower back pain in January but his discomfort greatly increased after the work incident. He also stated that when he initially considered taking FMLA leave he thought that his injury was not work related. However, he was asked by his surgeon following his surgery, whether he could think of an incident at work that might have caused the discomfort. That was when he remembered the work related incident.

Based on the record presented to date, the Board finds that claimant has not met his burden of proving his back injury arose out of and in the course of his employment with respondent.

**WHEREFORE**, the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 13, 2003, is affirmed.

**IT IS SO ORDERED.**

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<sup>6</sup> P.H. Trans. Resp. Ex. 1.

Dated this \_\_\_\_\_ day of August 2003.

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BOARD MEMBER

c:     Roger A. Riedmiller, Attorney for Claimant  
       Eric K. Kuhn, Attorney for Respondent and American Manuf. Mutual Ins. Co.  
       Nelsonna Potts Barnes, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director